ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION I

CA07-750

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| MIDLAND NATIONAL LIFE INSURANCE COMPANY | February 27, 2008 |
| APPELLANT | APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT |
| V. | [NO. CV2006-264] |
| FIRSTRUST FINANCIAL SERVICES, INC. | HON. PHILLIP T. WHITEAKER, CIRCUIT JUDGE |
| APPELLEE | AFFIRMED |

Midland National Life Insurance Company (Midland) appeals from the grant of summary judgment in favor of FirsTrust Financial Services, Inc. (FirsTrust), which entitled FirsTrust to cancel the policy and receive a full refund of the premium. FirsTrust is the trustee of the Pamela Roberts Irrevocable Life Insurance Trust, which was created by Raymond and Retha J. Roberts to benefit their daughter and granddaughters. The insurance contract contained an express condition that allowed the owner of the policy, FirsTrust, to cancel the policy within twenty days of receiving the written policy if it was not satisfied with the policy. On appeal, Midland argues that: 1) the trial court erred when it granted summary judgment because it "sufficiently delivered the policy" to FirsTrust and FirsTrust is "estopped from arguing otherwise;" and 2) the trial court erred in "prematurely" granting summary judgment

where a significant fact question remained regarding whether FirsTrust received the policy. We affirm.

Certain facts are not in dispute. The Roberts established the trust in 1993. At some point, estate planners determined that the trust needed additional life insurance to cover estate taxes. On October 18, 2004, Midland issued a policy insuring the life of Retha Roberts. The policy was intended to benefit the trust, and accordingly, the trust was the "owner" of the policy.

On October 21, 2004, Larry Kauffman, a long-time financial and insurance adviser to the Roberts family, and Mike Tucker, a licensed insurance agent representing Midland, met with the Roberts at the Robertses' office in North Little Rock. At that meeting, Retha signed certain documents as the "insured." Retha attended a second meeting at Midland's Cabot offices later that day. The purpose of the meeting was to give the trustee an opportunity to review and sign policy documents and allow Retha to deposit $50,000, the amount of the first year's premium, into the trust so that the trust could issue a check in that amount for the premium.

The policy contained a clause that states:

> It is important to Us that You are satisfied with this policy and that it meets Your insurance goals. Read it carefully. If You are not satisfied with it You may return it to Our Executive Office or to Your agent within 20 days after You receive it. We will then void it as of the Policy Date as though it was never issued and we will refund any premiums that have been paid. If we do not refund the premiums within a reasonable period of time, We will pay interest on such refund at the rate of 8% per year.

It is undisputed that Kauffman and Tucker again met with the Robertses on November 16, 2004, and at that time, Retha was given a copy of the policy. Kauffman and Tucker claim in their affidavit that Retha insisted that she would hand deliver the policy to the trustee at its Cabot offices. In her affidavit, Retha stated that she does not recall making such an offer.

Corporate Trust Officer for FirsTrust, Pamela J. Enloe, claimed that FirsTrust never received a copy of the policy. On May 26, 2005, she wrote to Midland, stating that the trustee had not received the policy, and asked for "termination of the application process and a refund of the premium." Midland apparently did not respond. In July 2005, however, Enloe received a copy of a letter dated June 27, 2005, from David L. Cox, Jr., Regional Vice President of Midland. In the letter, Cox offered to reduce the policy premium. Enloe rejected the offer. Along with a cover letter dated December 21, 2005, the Robertses returned the insurance policy to Midland. FirsTrust claims that the first time that it came into possession of the policy was on February 6, 2006. By letter dated three days later, FirsTrust returned the policy and requested a refund of the premium.

FirsTrust filed a complaint for declaratory judgment on May 31, 2006. In it, FirsTrust alleged that it never received the policy. FirsTrust prayed that the trial court find that it timely elected to cancel and that it was entitled to the return of the premium plus interest and attorney fees. Midland timely answered. FirsTrust subsequently propounded requests for admissions and interrogatories to Midland. Midland made no formal efforts at discovery.

On January 18, 2007, FirsTrust filed a motion for summary judgment. Attached to its motion was an affidavit from Enloe asserting that she received the policy on February 6, 2006,

and the trustee elected to reject the policy on February 9, 2006. Also attached was an affidavit from Retha Roberts, who admitted that she received what she later learned was the trustee's copy of the policy on November 21, 2004. She, however, asserted that she did not "understand that [Kauffman] gave the bank's policy and I do not recall telling him that I would deliver the Policy to the Trustee, as I understand he now claims." The trial court granted summary judgment in favor of FirsTrust, finding that Midland's delivery of the policy to Retha Roberts "is not delivery of the policy to the Owner within the meaning of the Policy."

For its first point on appeal, Midland argues that the trial court erred when it granted summary judgment because it "sufficiently delivered the policy" to FirsTrust and FirsTrust is "estopped from arguing otherwise." Midland urges us to find analogous *House v. Davis*, 130 Ark. 387, 197 S.W. 693 (1917), where the supreme court held that "it is the intention of the parties, and not the manual possession of the policy, which determines whether there has been a delivery thereof." It notes that in *House*, the applicant signed a promissory note for the premium and sought to avoid that obligation because he did not receive a copy of the policy that was mailed by the insurer. The supreme court held that it was proper to instruct the jury that if the insured did not notify the insurance company that it had not received the policy and did not request the issuance of a new policy or the return of the premium within a reasonable time, the insured was estopped from denying the issuance of the policy.

Here, Midland contends that there was no mode of delivery specified in the insurance policy, and therefore giving the policy to Retha Roberts for delivery to FirsTrust was at least equivalent to mailing the policy. Moreover, it contends that even assuming that Retha

Roberts did not deliver FirsTrust's original copy of the policy on November 16, 2004, FirsTrust's decision to wait over seven months before making any contact with Midland concerning nondelivery was unreasonable and, under *House*, FirsTrust should be estopped from denying the issuance of the policy. We find this argument unpersuasive.

Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Calcagno v. Shelter Mut. Ins. Co.,* 330 Ark. 802, 957 S.W.2d 700 (1997). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *Id.* Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

We believe that Midland's reliance on *House* is misplaced. The estoppel in *House* arose not from a common law duty to diligently seek delivery of a written insurance policy, but rather from an express term in the insurance contract. It stated that the policy was being sent by mail, and if it was not received in fifteen days, the owner of the policy was to write to the insurance company and inform it so that it could either issue a new policy or return the premium. Conversely, in the instant case, there was an express term of the insurance contract that stated no insurance would be in effect until the policy was "delivered to and accepted by the Owner." Furthermore, as the supreme court noted in *House*, the black-letter law concerning when a policy of insurance comes into force is that:

> Where an application is made for a policy of insurance which is accepted and the insured notified thereof, the contract is consummated without actual deliver of the policy, in the absence of a provision in the application requiring delivery.

Here, the insurance contract had an express condition requiring not only delivery but acceptance.

Finally, we note that although Midland argued to the trial court that Retha Roberts was the agent for FirstTrust in accepting delivery of the insurance policy, Midland, does not make this argument on appeal. We believe that absent some kind of agency arrangement, delivery to Roberts does not satisfy the delivery and acceptance requirement that is an express condition in the insurance contract.

For Midland's second point, it argues that the trial court's grant of summary judgment was premature because discovery was not complete. It urges us to find analogous *Marrow v. State Farm Insurance Company*, 264 Ark. 227, 570 S.W.2d 607 (1978), and *Pledger v. Carrick*, 362 Ark. 182, 208 S.W.3d 100 (2005), two cases where the supreme court reversed a grant of summary judgment where discovery was not complete. Midland contends that "discovery was ongoing in this case" and that it "had not yet had the chance to depose Mrs. Roberts and Mr. Roberts to test their credibility, motives, and bias" or to develop "related information that other insurance agents in early 2005 were attempting to sell a life insurance policy to Appellee, perhaps providing Appellee with financial motivation to extract itself from the Policy with Appellant." We also find this argument unpersuasive.

First, we believe that Midland's assertion that discovery was "ongoing" does not tell the whole story. While it is true that FirsTrust had sent out requests for admissions and

interrogatories, we can find no effort at discovery undertaken by Midland. While it contends that it needed to depose Mr. and Mrs. Roberts, it had failed to even schedule these depositions. When we review issues such as the one before us, a primary consideration is whether the appellants were diligent in their discovery efforts. *Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994). We hold that Midland's failure to institute discovery allows us no other conclusion than that it was not diligent in seeking discovery. It is this lack of diligence that makes Midland's proffered authority inapposite. In both *Marrow* and *Pledger* the supreme court held that it was error to grant summary judgment before allowing the appellant to "complete" discovery. Here Midland had no on-going discovery efforts to "complete."

Affirmed.

BIRD and MARSHALL, JJ., agree.